Chemical Solvents, Inc. *and* John Cook *and* Rick Trend *and* Robert H. Sweany. Cases 8–CA–28847, 8–CA–28903, and 8–CA–29003

July 12, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 30, 1998, Administrative Law Judge John H. West issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Chemical Solvents, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Richard Trend and John Cook and the unlawful warnings issued to Richard Trend, and within 3 days thereafter notify Richard Trend and John Cook in writing that this has been done and that the discharges and warnings will not be used against them in any way."

2. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Cleveland, Ohio facility copies of the attached notice marked 'Appendix.'[26] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 1996."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

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[1] The General Counsel filed a motion in opposition and motion to strike a portion of the Respondent's answering brief. The Respondent filed a Response to the motion. The General Counsel's motion is denied as lacking in merit.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge stated that, because the Respondent initially admitted the allegation of the complaint concerning the supervisory status of William Burnside and later sought to deny his supervisory status, the burden of proof on this issue shifted from the General Counsel to the Respondent. Although there is no specific exception on this point we shall correct the judge's statement to avoid establishing a misleading precedent. Under Board law the burden of proving supervisory status is on the party alleging that it exists, and the burden does not shift. See, e.g., *Bennett Industries,* 313 NLRB 1363 (1994); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). We have considered the evidence under the correct burden allocation, and we find that the General Counsel has established that Burnside is a 2(11) supervisor.

In finding that the Respondent demonstrated antiunion animus, the judge relied both on the Respondent's unlawful conduct and on certain of its statements that were not themselves violative of the Act. Member Hurtgen finds it unnecessary to rely on the statements that were protected by Sec. 8(c).

Because the record contains direct evidence of the Respondent's knowledge of the union activity of employees Richard Trend and John Cook, we find it unnecessary to rely on the judge's inference of knowledge based on the small plant doctrine. For example, Cook stated to Burnside 2 days before Cook was discharged that he supported the Union. Further, in Burnside's interrogation of Trend, Burnside asked why employees wanted a Union, to which Trend replied, "[You] should know why." Shortly after the discharges, Burnside stated to employee Robert Sweany that the Respondent knew Trend and Cook were "the guys behind" the Union.

Finally, we agree with the judge that Supervisor John McNutt threatened employees with unspecified reprisals if they supported the Union, in violation of Sec. 8(a)(1). We disavow, however, the judge's statement that management must be aware that an employee overheard an unlawful statement for there to be a violation. *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997). In concurring with respect to this finding of a violation, Member Hurtgen notes that Respondent's exceptions raise only the issue of credibility.

[4] We shall modify the recommended Order to comply with the Board's decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also order the Respondent to remove from its files any reference to the unlawful warnings issued to Richard Trend.

WE WILL NOT unlawfully threaten or interrogate you about your union activities or create the impression that your union activities are under surveillance.

WE WILL NOT place written warnings in your personnel files in order to discourage you from joining and/or assisting Teamsters Local Union No. 507 a/w International Brotherhood of Teamsters, AFL–CIO, or engaging in any other protected concerted activities.

WE WILL NOT discharge you because you engage in union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Richard Trend and John Cook full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Richard Trend and John Cook whole for any loss of earnings and other benefits suffered as a result of their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Richard Trend and John Cook and the unlawful warnings issued to Richard Trend, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and warnings will not be used against them in any way.

CHEMICAL SOLVENTS, INC.

Victoria Belfiglio, Esq., for the General Counsel.
Thomas L. Colaluca, Esq. (Johnson & Angelo), of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On charges filed by John Cook, Rick Trend, and Robert Sweany against Chemical Solvents, Inc. (Chemical or Respondent) an order consolidating cases, consolidated complaint and notice of hearing (complaint) issued in Cases 8–CA–28847, 8–CA–28903, and 8–CA–29003 on July 25, 1997, alleging that Respondent violated (a) Section 8(a)(1) of the National Labor Relations Act (the Act) by unlawfully threatening employees, unlawfully interrogating employees, and creating the impression that employees' union activities were under surveillance, and (b) Section 8(a)(1) and (3) by placing written warnings in the personnel file of Trend and by terminating Cook, Trend, and Sweany because they joined and assisted the Teamsters Local Union No. 507 a/w International Brotherhood of Teamsters, AFL–CIO (Union) and engaged in concerted activities, and to discourage employees from engaging in these activities. Respondent denies violating the Act as alleged.[1]

A hearing was held on March 24–26, 1998, in Cleveland, Ohio. On the entire record in this proceeding, including my observation of the demeanor of the witnesses and consideration of the briefs filed by counsel for the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation with an office and place of business in Cleveland, has been engaged in the recycling and distribution of chemicals. The complaint alleges, Respondent admits, and I find that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Cook was rehired by Respondent in May 1995.[2] Cook testified that John McNutt, who is Respondent's traffic manager, told him that he would be driving a tanker and servicing a waste water treatment plant; that he told McNutt that he would rather drive a van hauling tote containers and drums; that McNutt said that perhaps someone else could service the wastewater plant when it was up and running; that he drove the van; that when the wastewater plant started to run in mid to late 1996 someone else handled the traffic and he became backup driver; that when the driver went on vacation he handled the wastewater traffic for 1 week; that management did not indicate that it had a problem with this approach; and that on his return, Schill told him that he was only the second employee that Respondent had rehired and it was because he had done a good job.[3] McNutt testified that he interviewed Cook twice before he was rehired; that Cook was told that Respondent needed a driver for the water treatment division; that he wanted to rehire Cook because it would save Respondent a lot of time, effort, and money in that Cook would not have to be trained; that during the second interview Cook said that if it was possible, at some point he would like to be placed back in the general driving work force—he would much prefer that; and that he offered Cook a job at the end of the second interview. On cross-examination McNutt testified that he was aware of Cook's desire to have his old position back from the outset of his second term; that Cook had done a good job during his first term; and that when he rehired Cook he had a clean motor vehicle report. Subsequently McNutt testified as follows:

> Q. Okay. Is it possible that during your second interview with Mr. Cook, when he indicated an inclination to be able to go back to his old driving, that you might have mentioned the fact that you had discussed it with [driver] Mr. [Chuck] Vehovic?
>
> A. No.
>
> Q. No?
>
> A. Well, wait a second. I shouldn't say that I shouldn't say that. Let me—let me think this through. You know, I'm just being as honest as I can here.

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[1] At the outset of the hearing, counsel for the General Counsel's motion to amend the complaint to include three additional allegations of unlawful threats was granted. GC Exh. 2. In its answer to the complaint, Respondent admitted that at all material times William Burnside was a supervisor within the meaning of Sec. 2(11) of the Act and an agent of Respondent within the meaning of Sec. 2(13) of the Act. At the hearing Respondent took the position that Burnside was not a supervisor as defined in the Act.

[2] He was originally hired by Respondent in September 1991 but he left Respondent for what he thought would be a better paying job. Respondent offered to increase his pay to get him to stay.

[3] Three memorandums from 1992 and 1994 were received as GC Exhs. 16, 17, and 18. They refer to customer compliments regarding Cook.

> I probably mentioned to John Cook that I would discuss with other drivers the possibility of moving over into the water division. I hope that answers your question.

Trend was hired on August 7, 1995, by Burnside as a materials handler. Trend testified that worked this job under the supervision of Burnside until he, Trend, was transferred into inventory in February 1996; that he worked in inventory until he was terminated; that Burnside was his supervisor while he worked in inventory; that about a month after he was transferred into inventory Burnside told him that Schill wanted him to pick his break times and stick to them;[4] that part of his job in inventory was to list product on inventory sheets and this would occupy from 45 minutes to 2 hours a day; that, like other employees who had paperwork, he did his paperwork in the lunchroom; and that in April or May 1996 Burnside told him that Schill said that he did not want Trend doing his paperwork in the lunchroom because it looked like he was taking a break. On cross-examination Trend testified that fellow employees did not complain to him about his work performance when he was a materials handler. Burnside testified that Trend was not pulling his load as a materials handler; that Schill suggested that the position of inventory control man be created and Trend, who had a good attendance record, be transferred into the position; that Trend's new job was to inventory drums on inventory sheets so that when the materials handlers need a product they would know where it is at; and that there were problems with Trend as inventory clerk because he did not store product where it belonged and list all of the product on the sheets, and consequently product would be mistakenly backordered. When called by Respondent, Schill testified on cross-examination that Burnside interviewed Trend and he did not recall personally interviewing Trend; and that Burnside came to him and recommended to him that Trend be hired, and he hired Trend based on Burnside's recommendation.

According to Cook's testimony on cross-examination in early 1996 he had a manifest discrepancy form in his company mailbox and he spoke to McNutt about it. Cook testified that McNutt asked him what happened, rolled the document up and threw it away, and said I talked to you.

General Counsel's Exhibit 15 is an employee performance evaluation for Cook dated "3/96." In it he is given an overall satisfactory rating. The document contains the following in the comments portion:

> Has shown very little willingness to become the permanent water plant driver that he agreed to be when we hired him back, he is openly complaining that he does not want to do the type of work required in this position even though on 2 different occasions before we agreed to take him back the work was explained to him in detail. This has become a serious problem I will have to address.

No one signed on the lines designated "RATED BY" and "APPROVED BY." And in the box with "I have reviewed this evaluation and I completely understand its contents" and lines for "Employee's signature" and "Date" there is no signature or date. Cook testified that he had no idea who filled out this evaluation; that the drivers usually filled out their own evaluation sheets and turned them in;[5] that he turned in an evaluation but this is not the one he turned in; that he first saw this evaluation when he gave his affidavit to the National Labor Relations Board (Board); that he did not sign and date prior evaluations; and that he received a 25–cent–an–hour raise at the time of this evaluation. McNutt testified that it took quite a while for the water division to get up to the anticipated level and in the meantime Cook was working in the general driving fleet; and that in the middle of 1996 Cook was transferred out of the water division back into the general driving force. On cross-examination McNutt testified that Vehovic replaced Cook in the water division.

On May 3, 1996, Cook received a traffic citation, General Counsel's Exhibit 19, for turning left through red light and failing to yield right of way to other traffic. Cook testified that he made McNutt aware of this citation; that he was in the intersection and he could not back up safely so he proceeded through; that when he gave the citation to McNutt he said "things happen, and watch yourself," and that McNutt did not say that a warning was going to be placed in his file about this. McNutt testified that he discussed the citation with Cook.

General Counsel's Exhibit 23 is a "MANIFEST DISCREPANCY FORM" dated "5–8–96" and a manifest. The form indicates that 27 drums of product to be recycled were manifested in and 26 drums actually came in on Cook's truck. The manifest lists 27 drums and it is signed by Cook among others. Cook testified that when he was asked about the discrepancy he told the clerk in the waste department that he counted the drums on the truck and there were 27; that he did not discuss this matter with a supervisor; and that he was not told by the clerk that this was a warning of any type. McNutt testified that if Respondent has too many discrepancies it can be fined by the Environmental Protection Agency or the Department of Transportation;[6] that the driver is required to review the manifest and make sure it is filled out properly and then sign it; that he discussed these documents with Cook; and that he put this report and other similar reports in the file for future reference in case there was a repetition. On cross-examination McNutt testified that he was not aware that the Company ever paid a fine for Cook's or any other employee's manifest discrepancies; and that all of the drivers make errors in the manifests which result in manifest discrepancies and he counsels every driver when the reports come out.

General Counsel's Exhibit 24 is a "MANIFEST DISCREPANCY FORM" dated "5–10–96" and a manifest. The form indicates that two 55–gallon drums of product to be recycled were manifested in and 1 drum actually came in on Cook's truck. The manifest lists two drums and it is signed by Cook among others. Cook testified that he first saw this exhibit during witness preparation which occurred on March 23 and 24, 1998; that he did not recall the incident; that it was not brought to his attention; and that he was never informed that the form would be placed in his personnel file. McNutt testified the he discussed these documents with Cook; and that he also put this report in the file.

General Counsel's Exhibit 25 is a "MANIFEST DISCREPANCY FORM" dated "5–31–96" and a manifest. The form indicates that the manifest is not signed by the generator/or transporter. The manifest is not signed by Cook or someone in the generator's box. Cook testified that he first saw this exhibit during witness preparation which occurred on March 23 and 24, 1998; that on or about May 31, 1996, this document was not called to his attention, he was never told that a copy was going in his file and he was never told that it was equivalent to any kind of an employee warning;

[4] As a materials handler he was allowed to take his breaks when he had free time.

[5] Trend also filled out his own evaluation. GC Exh. 9.

[6] According to McNutt's testimony, Respondent could even lose its license.

that he does not recall any such incident; and that his name appears in the margin of the form but it does not appear anywhere else on the form; and that he has served the customer specified on the form but he did not know if he was the one involved. McNutt testified the he discussed this discrepancy with Cook and placed it in the file.

General Counsel's Exhibit 10 is an "EMPLOYEE WARNING REPORT" for Trend dated "6–12–96" which Burnside signed as supervisor. The report contains the following:

> On June 11, 1996 I confronted Rick about long breaks and to many breaks. Every time I turn around Rick is gone. I just remind Rick you get 2 breaks and a 1/2 hour lunch. This has been an ongoing problem for a long time and it has to stop.

There is a line for the "Employee's Signature" just after the following sentence: "I have read this 'warning decision' and understand it." Trend did not sign the form. He testified that the first time he saw this document was at the Ohio Bureau of Employment Services Review Board after he was terminated by Respondent. Burnside testified that two employees, Shannon Jones and Al Price, complained to him that they saw Trend smoking near acid tone and propane, respectively,[7] he saw Trend smoking while he was reviewing a common carrier's bills of lading and talking to the driver on the public street after the truck was loaded, he was aware that Trend asked the employees in production if they had anything to go to the lab so that he could smoke and Trend's job was inventory and not logging in samples for production; that Trend would go to the lunchroom for hours at a time rewriting the inventory sheets and Schill told him that Trend should not work in the lunchroom; and that he told Trend that he was writing him up. On cross-examination Burnside testified that he saw Trend smoking in the lunchroom and it was permitted there; that he never saw Trend smoke in a hazardous area; that he would have taken immediate action if he had seen Trend smoke in a hazardous area; and that he was unable to verify whether the two employees saw Trend smoking in a hazardous area. Schill testified that he did not recall anyone ever asking an employee to sign an employee warning form.

General Counsel's Exhibit 20 is an "EMPLOYEE WARNING REPORT" for Cook dated "8–14–96" which McNutt signed. The report contains the following:

> John Cook failed to inspect his load of material as his daily duties require him to do, resulting in 8 drums of material not being on his van before he left here & a customer not being serviced properly. I spoke to John about the importance of carrying out his duties with better attention to detail.

Regarding the type of violation, McNutt wrote "[f]ailure to comply with policy & procedures." There is a line for the "Employee's Signature" just after the following sentence: "I have read this 'warning decision' and understand it." Cook testified that he did not sign it; that the first time he saw this document was at the hearing in March 1998; and that he did not recall McNutt (1) warning him to pay more attention to loading his van on or about August 14, 1996, (2) mentioning that he had failed to inspect the loading of his van, (3) telling him that he had failed to fulfill his duties and a warning was going to be placed in his file, or (4) warning him that he had failed to comply with policies and procedures. On cross-examination Cook testified that no one in management ever discussed the substance or the subject matter of this document with him. McNutt testified that the employee does not always see the written warning and it is not the company's policy to show the warning to the employee; that Cook said that he had inspected his load that morning but he must have miscounted; that eight 55-gallon drums were not on the trailer for Cleveland Steel Container that day; that Cook told him that he did not have the 8 drums on his truck and he knew this from the shipping documents he had in his possession; and that the product was not delivered to the customer that day because Cook failed to tell him early enough in the day to make other arrangements to have the product delivered that day. On cross-examination McNutt testified that in most cases the Company does not tell the employees that warning reports are going in their files.[8]

General Counsel's Exhibit 21 is an "EMPLOYEE WARNING REPORT" for Cook dated "8–15–96" which McNutt signed. The report has a number of documents attached to it. Regarding the type of violation, McNutt wrote "not following procedures and policies." There is a line for the "Employee's Signature" just after the following sentence: "I have read this 'warning decision' and understand it." Cook testified that he did not sign it; that the first time he saw this document was at the hearing in March 1998; that while driving down road a car pulled out from a stop sign in front of him and he had to apply the truck's brakes hard and, unbeknownst to him at the time, his load of totes and drums shifted forward; that subsequently at a weigh station his truck was red lighted as the axles passed over the scale, and a state official inspected the load; that the official discovered that some of the drums were crushed or dented but not leaking; that he gave the official all of the papers that he had in the truck and his driver's license; that he received a citation for (1) failure to comply with HAZMAT regulations, (2) loading/unloading requirements (3) movement between packages, and (4) tiretread/sidewall separation[9]; that the certificate in issue was in the documents that he gave to the official but it was overlooked; that the official did not require him to put the drums in a safe container, and the official let him deliver his load; that McNutt asked him to write out a statement of what happened and he turned it into McNutt; that later in the week he spoke with McNutt about the incident; that drums hold 55 gallons and tote containers hold 450 gallons; that a tote

[7] Burnside testified that Respondent has a policy that smoking can only be done in designated areas and R. Exh. 2 contains an employee safety awareness sheet which indicates that smoking is discussed with employees.

[8] The "EMPLOYEE WARNING REPORT" form has Respondent's name at the top and a box with the following:

Employee Statement

Check Proper Box

- I concur with the Company's statement.
- I disagree with the Company's statement for the following reasons:

I have entered my statement of the above matter.

Employee's Signature_____Date_____

Also it contains the following:

I have read this 'warning decision' and understand it.

_____

Employee's Signature Date

McNutt conceded that the Company's own form is not complied with when there is no employee statement or employee signature.

[9] The violations code was specified. The copy of the citation given to Cook was signed by McNutt on "8–16–96" and apparently returned to the Motor carrier Registration Division. Subsequently Respondent received a "NOTICE OF APPARENT VIOLATION AND INTENT TO ASSESS FORFEITURE" which listed one violation regarding the tractor, namely, "FAIL. TO PROVIDE RSPA AT TIME OF INSPECTION." and two violations regarding the trailer, viz., "FAILURE TO PREVENT RELATIVE MOTION" and "SEPARATION OF ANY TREAD OR SIDEWALL." Respectively, the forfeiture (or fine) was $500, $1020, and $127.50.

shifted and damaged two drums; that McNutt said that the way the totes and drums were loaded was unsafe; that he did not want to argue with his supervisor so he agreed; that McNutt was angry and he indicated that Schill was very upset; that McNutt did not tell him that there would be a warning placed in his file regarding this incident; and that the Company was assessed a fine. On cross-examination Cook testified that he received safety training on pretrip inspection, on how to secure cargo and having the proper certificates when transporting the involved products, all of which is the responsibility of the driver; that he gave the official at the weigh station the binder with the certificate in it but apparently he did not see it; that no one from management ever told him that he failed to properly secure his loads, to properly inspect his loads or to follow proper pretrip inspection procedures; that McNutt did ask him if he checked the load; that it is the driver's responsibility to make sure that the load is secure; that McNutt did ask him if the load was secure; that it is the driver's responsibility to make sure the load is secure before he leaves the plant; and that the totes were not strapped down but rather loading bars were used. On redirect Cook testified that the total fine was just over $1600; that he did not sign the employee warning report regarding the August 14, 1997 incident; and that he was not told that a warning was going to be placed in his file. McNutt testified that drivers are trained with respect to pretrip inspections; that drivers, as here pertinent, are required to inspect and make sure that they have the right amount of pieces on the trailer for delivery that day and that the load is secured properly before they go down the road; that every driver has a black binder wit all the necessary documents in it; that on August 14, 1996, Cook telephoned him in the early part of the afternoon and told him that he was cited by the Public Utilities Commission of Ohio (PUCO) during a normal inspection; that the next day he asked Cook what happened; that he made a drawing of the location of the drums and totes in the trailer according to Cook's description; that it appeared that there was no tote bar to keep the totes from shifting into the drums and he did not know if he ever got a truthful answer from Cook to his question regarding this; that Cook said the he did not know what required paperwork the official was claiming that he did not have but he gave the official the binder with all of the required paperwork; that after he got with his internal regulation people they looked up the regulation that they were being charged with and it turned out to be a document that Cook should have had in the binder; that "at a later date" he approached Cook with a copy of the document, Cook said that he had the document, and he retrieved copy and showed it to him.[10] On cross-examination McNutt testified that Respondent did not pay the entire fine. Subsequently, McNutt testified that, other than the above-described May 3, 1996 citation, he did not recall that Cook had ever received any other citation or violation from the PUCO; that when he saw the violation with respect to documentation he did not understand it and had to go to someone who had expertise in the field to find out what the section cited in the citation actually referred to; and that Cook should have asked the PUCO officer on site what that violation involved. When called by Respondent, Schill testified on cross-examination that Cook was not the only driver to cause Respondent to be fined, he was sure that on other occasions Respondent has had drums damaged in transit, and he was not aware of any situation where the drivers were dismissed because the drums were damaged or a fine was assessed.

General Counsel's Exhibit 22 is an "EMPLOYEE WARNING REPORT" for Cook dated "8–22–96" which McNutt signed. The report contains the following:

> I came in early to watch pretrip inspections of drivers without them knowing I was watching. During John Cook's pretrip he did not climb up into his van to inspect the load for proper secureness or count the materials to make sure they were all there he only opened the door up from ground level, looked inside for a few seconds & closed the door. He had 2 totes & 15 drums loaded. This is clearly a violation of pretrip procedures.

Regarding the type of violation, McNutt checked off safety. McNutt also wrote "[c]ontemplating termination of employment" on the form and McNutt listed as a previous warning the "8–14–96" "[w]ritten" warning as a "1st Warning." There is a line for the "Employee's Signature" just after the following sentence: "I have read this 'warning decision' and understand it." Cook testified that he did not sign it; that the first time he saw this document was at the hearing in March 1998; that he disagreed with what was written on the form because (a) he climbed in all of his vans and inspected them and he carried a flashlight just for that purpose and (b) it would be impossible to open a van door from ground level since you could not get enough leverage to open the door; that he always inspected his load before he left and counted the drums; that McNutt did not say anything to him about not properly inspecting his load, about receiving a warning or about contemplating his termination; and that he was never given time off for failing to inspect his vehicle properly. McNutt testified that he discussed this incident with Cook; that Cook said that he inspected his load properly; that he told Cook that he was watching him; and that shortly after this he decided to terminate Cook because he did not believe that Cook was telling him the truth about the August 14, 1996 incident, and he was concerned that Cook was not securing his loads properly. On cross-examination McNutt testified that he decided that, with close supervision, it would be okay to keep Cook around until after the holidays notwithstanding the fact that he spends almost all of his time out on the road unsupervised; that he decided to terminate Cook because Respondent did not want the liability he could bring to it, which could be thousands and thousands of dollars; and that he never gave Cook time off for any of the above-described violations. Subsequently McNutt testified that the base of the rear door on Cook's trailer is about 4 feet off the ground; and that opening it is similar to lifting a 25-pound bag straight in the air.

General Counsel's Exhibit 26 is a "MANIFEST DISCREPANCY FORM" dated "8–28" and a manifest dated "8/28/96." The form indicates only "corrosive sodium hydr." Cook testified that he could not tell what the problem was by looking at the form; that he did not recall anyone from wastewater or a supervisor bringing this to his attention on or about August 28, 1996; that he was never warned about anything like this; and that he was never told that anything like this would go into his file. McNutt testified that here Cook did not obtain the land band form which is required to accompany each waste manifest; and that he discussed this discrepancy with Cook and he placed it in his file; that General Counsel's Exhibit 27 is a "MANIFEST DISCREPANCY FORM"

[10] In a memorandum dated "8–15–96" to Cook's file, which is included in GC Exh. 21, McNutt wrote as follows:

> He also had a responsibility to read & understand this citation before accepting it, and if he would have he would of realized that he had in his possession a copy of the Hazardous Material Certificate of Registration, he could have produced it for the inspector & we would not have been cited for it, unless he lied to me again about actually having it on his person as required.

dated "8–28–96" and a manifest. The form indicates "Box containing type not marked." Cook testified that he first saw this document during witness preparation on March 23 and 24, 1998; that he does not remember anyone bringing this to his attention; and that he was not told that a warning would go into his file and he was not told that this document constituted a warning. McNutt testified that he discussed this document with Cook and placed it in the file with the others.

General Counsel's Exhibit 11 is an "EMPLOYEE WARNING REPORT" for Trend dated "11–5–96" which Burnside signed.. The report contains the following:

> John McNutt sent Rick to look for Exxate 800. He said he could not find any. Within 5–7 minutes I fond a drum. Rick's response was if they had not taken the eyeglass program away, I would be able to see.

There is a line for the "Employee's Signature" just after the following sentence: "I have read this 'warning decision' and understand it." Trend did not sign the form. He testified that the first time he saw this document was at the Ohio Bureau of Employment Services Review Board after he was terminated by Respondent; that he could not find a drum at 7 of 7:30 p.m. in the dark with a flashlight and Burnside was able to find the drum in the daylight the next day; that another employee, Tom Terry, who was present when Burnside discussed this incident with Trend, said that he should tell Burnside that if Respondent had not taken away the employees prescription eyeglass coverage he would have found the drum; that after Terry made his statement he, Trend, said "yeah, that's kind of funny"; and that Burnside did not tell him that he was going to place a warning in Trend's file. On cross-examination Trend testified that the drum in question was obviously moved by someone else and not placed in inventory; and that the drum was not where it was supposed to be. Burnside testified that even though Trend looked for the product in the dark there are four to six lights in the area and when employees are hired they are given flashlights; that when he showed Trend where the product was located he asked Trend how he could miss it and Trend jokingly said "if we hadn't taken the eyeglass plan away, he would of been able to see it"; and that Trend knew that he was going to place the warning report in his file.

According to his testimony, Trend first began discussing the Union with his fellow employees in December 1996 when he talked to about 25 employees about the Union. Trend testified that he asked the employees how they felt about a union and if they responded positively, he discussed it in depth; that if the employee he approached about a union responded negatively, he walked away; that he discussed getting a union with Cook in December 1996; and that Cook agreed to discuss a union with his fellow truck drivers.

According to the testimony of Burnside, on about December 12, 1996, or about 2 months before Trend was terminated he, Burnside, recommended that Trend be terminated. Burnside testified that he went to employee Tim Vales and asked him if interested in the job; that Vales said that he did not want to take someone else's job; and that he told Vales that he was not going to recommend anything before the holidays. On cross-examination Burnside testified that his affidavit to the Board indicates that Vales expressed an interest in this position. Vales testified that when Burnside asked him if he was interested in the inventory control job in December 1996 he said that if the position was open he would take it but he did not want to "take another fellow employee's job, just to see him released, unless he wasn't doing his job"; and that he told Trend that his job was in jeopardy, you got a chance of getting fired here, and you're not pulling your load. On cross-examination Vales testified that he told Trend that his job was in jeopardy based on the conversations that he had with Burnside.

General Counsel's Exhibit 28 is a number of documents dealing with an alleged manifest discrepancy which occurred on December 17, 1996. Cook testified that he saw the discrepancy documents during witness preparation which occurred on March 23 and 24, 1998; that the manifest discrepancy form is dated "2–17–96"; that he did not know why there was a discrepancy here; that he recalls the generator giving him six drums instead of four and he had the generator make a notation of that fact on the manifest; that no one in waste handling and his supervisor did not bring this matter to his attention; and that his supervisor did not tell him that a copy of this was going into his file nor that the manifest discrepancy form was the equivalent of a warning. McNutt testified that he discussed this document with Cook and put it into the file with the others; that the drivers are trained how to deal with manifest reports; that when he discussed the above-described discrepancies with Cook, he would indicate that it was human error; and that he did not discipline Cook for any of the above-described discrepancies because they were human errors.

General Counsel's Exhibit 12 is an "EMPLOYEE WARNING REPORT" for Trend dated "12–18–96" which McNutt signed as traffic manager on the preparer line of the form and not the supervisor's line. The report contains the following:

> There have been numerous instances when I've asked for current physical counts on various products, I've consistently been given incorrect information & at times drastically wrong. I was originally an advocate of help creating this specialized position but if this is the caliber of information I'm going to receive then at our next meeting I will recommend to terminate the position of the employee.

There is a line for the "Employee's Signature" just after the following sentence: "I have read this 'warning decision' and understand it." Trend did not sign the form. He testified that the first time he saw this document was at the Ohio Bureau of Employment Services Review Board after he was terminated by Respondent; and that he did not remember a specific conversation with McNutt or Burnside where they complained about him not keeping correct counts in inventory; that the actual physical inventory was to be taken within the next week or two so no one was worried about the count of product; and that he was never told that a warning was being placed in his file. On cross-examination Trend testified that he did not take directions from McNutt regarding inventory control; and that if McNutt wanted him to do something he had to check with Burnside. McNutt testified that he was not in a position to discuss Trend's job performance with him since he had an immediate supervisor to whom he would go if he had a problem with Trend; that he did not discuss this warning with Trend but rather spoke with Trend's immediate supervisor, Burnside. Burnside testified that McNutt discussed this matter with him and indicated that he was also going to discuss it with Schill.

Toward the end of December 1996, according to the testimony of Trend, Burnside asked him why the employees wanted a union when he and Burnside were in the drumming warehouse. Trend testified that he told Burnside that he could see the conditions and he should know why; and that Burnside said that people would be terminated if it was found out who was doing it. On cross-examination Trend testified that Burnside said if management

found out who was leading the drive, they would be terminated; and that this conversation occurred probably around the middle of December 1996; that while he was at the plant talking to other employees he did not wear any union insignia such as a union shirt, hat, or buttons; and that he did not identify himself as a union organizer except to fellow employees. On redirect Trend testified that Burnside said that if employees organized a union they would be terminated.

According to the testimony of Tom Zdanowicz, a business agent and trustee of the Union, Trend telephoned the Union in mid-January 1997 and spoke with Zdanowicz about how to organize a company. Trend testified that he contacted the Union in the beginning of January 1997; that he spoke with Zdanowicz and it was determined that arrangements would have to be made to have the employees attend a meeting at the Union; and that he passed out union literature that he obtained from the union hall.

Sometime after he contacted the Union and during the period that he was discussing the Union with his fellow employees Trend was in Burnside's office. Trend testified that Burnside was kind of questioning about the Union and Burnside said that people would be terminated if management found out and Schill did not like him, Trend, and Burnside did not know why; that Burnside was management; that Burnside asked why do the employees want the Union; and that he told Burnside that he should know why. On cross-examination Trend testified that Burnside said that if management found out who was leading the drive, they would be terminated; and that he was in Burnside's office doing the paperwork at the second desk. On redirect Trend testified that Burnside said that if employees organized a union they would be terminated. Burnside testified that he was not aware of Trend's union activities prior to the day he was terminated; that he never had any discussions with Trend regarding why a union was needed at Respondent; that he never threatened any employee regarding union activities; and that he never interrogated any employees regarding union sympathies.

Cook testified that sometime between January and early February 1997 Trend approached him and mentioned the Union; that Trend asked him to speak with the drivers; that Trend had already contacted the Union when he spoke to him; that he spoke with about 10 drivers, indicating that he was in favor of the Union; that he told Trend of the driver's interest and Trend told him about the union meeting; that he suggested to Trend that the meeting be held at the union hall; that later Trend told him that the meeting would be held at the union hall; and that he told Trend that he would attend the meeting at the union hall. On cross-examination Cook testified that Vales along with Trend, approached him about the Union; and that he considered Trend and Vales to be active in organizing the employees.

General Counsel's Exhibit 13 is an "EMPLOYEE WARNING REPORT" for Trend dated "1–16–97" which Burnside signed on the preparer's line but he wrote "supervisor" after his signature. Burnside dated his signature "2/16/97." The report contains the following:

> On 1–16–97 I asked Rick to put away Diallmine that came in that day. He did not put in assigned area. That results in loss of time for other employees looking for this material. That is not good inventory control.

There is a line for the "Employee's Signature" just after the following sentence: "I have read this 'warning decision' and understand it." Trend did not sign the form. He testified that the first time he saw this document was at the Ohio Bureau of Employment Services Review Board after he was terminated by Respondent; that Burnside knew that the Diallmine would not fit in the row where the rest of the Diallmine was placed because an open area had to be maintained for the fire marshall; that he started a new row for the Diallmine; that at the time he told Burnside where he placed the Diallmine and why he could not put it with the other Diallmine; that Burnside did not say anything about placing an employee warning in his file about the Diallmine; and that this occurred after Burnside had discussed the Union with him two times. Burnside testified that he discussed this with Trend; and that he could not remember what Trend said. Burnside testified that his "2/16/97" date is "[p]robably just a mistake. I didn't even notice it." On recross when Burnside was asked "—this document was placed in Mr. Trend's file after he was terminated," he answered "[n]o. No, this was when it happened."

General Counsel's Exhibit 14 is an "EMPLOYEE WARNING REPORT" for Trend dated "Jan 17, 1997" which Burnside signed on the preparer's line but he wrote "Supervisor" after his signature. The report contains the following:

> On Jan 16, 1997 Rick was told to do a tote of n. butyl alcohol for PPG. This tote was to be sampled that day for lab to approve on day shift. It is important to sample PPG material 24 hrs before you ship or you get a nonconformance (Rick did not do the tote at all) (His reply was he forgot.)

There is a line for the "Employee's Signature" just after the following sentence: "I have read this 'warning decision' and understand it." Trend did not sign the form. He testified that the first time he saw this document was at the Ohio Bureau of Employment Services Review Board after he was terminated by Respondent; that he did what he was supposed to with respect to sampling the tote on this day; that he never told Burnside that he forgot to sample the tote; that Burnside never told him that he was going to put this warning in his file; and that this alleged incident occurred after Burnside spoke to him two times about his union activity. Burnside testified that McNutt asked why the sample was not logged in at the lab and when he asked Trend about it Trend said that he forgot; that there is no special logging for PPG; that it was determined from the log book that Trend did not perform this function; and that he placed this report in Trend's file. On cross-examination Burnside testified that he did not check the log book or the analysis sheet to see if the sample was logged in.

According to the testimony of Trend, around the middle of January 1997 Schill saw him discussing the Union with another employee. Trend testified that while he was talking to another employee about the Union in the main warehouse Schill came out of his office and was about 20 to 30 feet from Trend and the other employee; that Schill observed him for a couple of seconds while he spoke with the other employee; and that Schill did not say anything to him about this conversation. On cross-examination Trend testified that no one asked him about this conversation. Schill testified that he did not know Trend was there until he walked out, he did not hear what was said and he did not see trend handing out literature.

Sweany began working for Respondent on January 29, 1997, as a materials handler. He was hired by Burnside who advised him that there was a 90-day probationary period and at the end of the 90 days there would be an evaluation.

On January 31, 1997, Sweany signed an acknowledgment, General Counsel's Exhibit 6, that he received an employee handbook, General Counsel's Exhibit 7.

On or about February 5, 1997, Trend approached Sweany and told him that a lot of the employees were not happy with the way they were being treated by management, he had talked to the Union, and there was a union meeting on February 15, 1997. Trend asked Sweany if he would like to attend and Sweany indicated that he would go.

On February 12, 1997, according to the testimony of Cook, in the presence of another employee, Keith Bailey, Burnside said that McNutt takes this union business very personal, he takes care of his drivers and this week he's going back through all the files and he is going to fire one of the drivers. Cook testified that he said, "well, shit, that's not fair"; that he also said that there are a lot of things that are going on that are not fair all of a sudden, citing the fact that a driver for another company drove for Respondent on his time off which deprived Respondent's drivers of this work; and that during this conversation he expressed his support for the Union. On cross-examination Cook testified that he overheard Bailey telling Burnside that the employees needed a union; and that he would stake his life on the fact that Burnside then said that McNutt was taking this union business seriously or personally and that's okay, he's going to go back in the files and fire a driver this week. When asked if he recalled ever telling any person that "I take this union business personally, I take care of my drivers, but that's okay, I'm going to go back into all their files, and I'm gong to fire one this week," McNutt testified that he never said that complete statement; that he never said anything regarding firing people because of the Union; and that he did take care of his drivers. McNutt also testified that he never threatened any employee at Chemical Solvents because of union activity.

Trend was terminated on February 13, 1997. With respect to the termination of Trend, Jerry Schill, Respondent's vice president of operations, testified, when called by counsel for General Counsel, that Trend was terminated because his job performance was not satisfactory in that Trend had mistakes with inventory control, took unauthorized breaks and was caught smoking in an unauthorized, very dangerous area; that in February 1997 he decided to terminate Trend; that traffic manager John McNutt and Burnside first recommended Trend's termination in October 1996; that repeated performance problems triggered the decision to terminate Trend in February 1997; that McNutt and Burnside complained to him independently about Trend in February 1997; that McNutt complained about inventory problems and Burnside complained about safety and unauthorized breaks; that he made the decision to terminate Trend based on what McNutt and Burnside told him and also based on the fact that in the past Trend was brought to his office more than once because of his documented inadequate performance; and that he personally terminated Trend. Trend testified that he was terminated on February 13, 1997; that he was called into Burnside's office at the beginning of his shift; that Schill and Burnside were present; that Burnside said this matter is not open for discussion, your services are no longer needed here, you're terminated; that Burnside said that he was terminated for poor performance; that Schill said that if he was to come back on the property it would be as a visitor; and that as he was escorted off the property by Burnside he said that he felt he was terminated because of union activity and Burnside said that he could not discuss the matter because he was in fear for his job. On cross-examination Trend testified that he received training about where he should and could not smoke; that he had been warned about smoking in unauthorized areas; that he never smoked in an unauthorized area; and that he did smoke when he went between the plant and the lab but he did not believe that this was company property. McNutt testified the he recommended to Trend's immediate supervisor, Burnside, that unless Trend corrected instances such as the one he wrote up on December 18, 1996, Trend should be replaced. Burnside testified that Vales indicated that he would take the job; that Schill had told him that "this guy is not good for our company we have got to do something"; that he recommended to Schill that Trend be terminated because Trend did not get along with the other employees and Trend took unauthorized breaks; that Schill terminated Trend; that when he walked Trend to his locker, Trend said that he guessed that Schill did not want a Union and that he was the man; that he did not tell Trend that he couldn't talk to him because he, Burnside, was afraid he might lose his job; and that prior to this he was not aware that Trend engaged in any union activities. On cross-examination Burnside testified that he asked Vales a number of times if he was going to take the job; and that Vales finally agreed about 2 weeks before Trend was terminated. When called by Respondent, Schill testified that Burnside told Trend that he was recommending that he be terminated and then he, Schill—who was present, terminated him; that he did not terminate Trend for union activities; and that he first became aware that Trend engaged in union activities at the hearing.

Cook was terminated on February 14, 1997. Schill testified, when called by counsel for General Counsel, that Cook was terminated for job performance or more specifically, because Cook did not properly do a pretrip inspection of his trailer, left Respondent's facility with less than the number of containers he was supposed to have and an unsecured load in late August 1996, some drums were damaged when the load shifted, he was stopped for a random check by PUCO and given a citation for the unsecured load, damaged drums, and his check load did not match his list; that in his opinion, Cook was not truthful in going through the incident report process; that he asked McNutt to monitor several of the drivers to see if they were following the protocol for pretrips and load securement; that on one morning in late August or September 1996, McNutt witnessed Cook failing to pretrip his tractor and trailer; that McNutt independently made the decision to terminate Cook in late August or September 1996; that at the time he also recommended to McNutt that he replace Cook; and that McNutt terminated Cook. Cook testified that he was asked to come to McNutt's office where McNutt, in the presence of Schill, told him that he was bring terminated because they were not happy with his performance; that he repeatedly asked why and finally Schill said you run around with unsafe loads; that when he said that is not true, Schill said "end of story"; and that he never missed a day of work and he was never tardy. McNutt testified that although he decided to terminate Cook on or about August 22, 1996, he was not terminated until February 14, 1997, because (1) Respondent has an unwritten policy that it does not disturb its service to its customers and so it looks for a replacement driver before it actually terminates the driver in question,[11] (2) he and his superior felt that because of the length of time that they knew Cook it would not be humane to terminate him right before the holiday season so they decided to wait until close to the holidays to start looking for a replacement so that Cook could get his holiday pay, (3) while an ad was placed in the newspaper[12] for a replacement in November 1996 and a candidate was chosen,[13] that

[11] McNutt indicated that the process takes from 4 to 8 weeks.

[12] R. Exh. 4 is an invoice for the ad which ran on November 24, 1996, for "DRIVERS ROADN."

[13] R. Exh. 5 is a "NOTICE OF NEW EMPLOYEE" for Bob Kopping.

person did not take the job because he received a raise and decided to stay with his employer, and (4) Respondent had to start the process all over again but it did find a replacement before terminating Cook. McNutt also testified that while he was sure that other drivers have lied to him and they are still working for Respondent, Cook lied about a very serious situation in that he was transporting flammable liquids and instead of admitting his mistake, he tried to cover it up; that Cook "lied to me again just a few days later when I caught him not securing his load properly"; and that Cook lied to him when he was rehired and later indicated that he did not want to do the driving for the water plant, there was a "history of lying" and that was the difference;[14] that prior to terminating Cook he did not have any conversation with him about union activities, he was not aware of any union activities on the part of Cook until Cook told him on the day he was terminated, and he was not aware that Cook was a member of the Union. On cross-examination McNutt testified that in view of the reduction of discrepancy reports Cook vastly improved his performance on this part of his job. When called by Respondent, Schill testified that McNutt made the decision to terminate Cook; that McNutt can hire or fire someone without his permission; that he first became aware of Cook's union activities as Cook described them here at the hearing; and that Cook was fired because he did not follow the pretrip procedures to make sure that his load was secured and he had the correct product and bills of lading on the truck, and because there were discrepancies in Cook's stories about what happened.

The Union held its first meeting with Respondent's employees on Saturday February 15, 1997. Zdanowicz, who attended, testified that 27 employees attended this meeting, including Trend, Cook, and Sweany; that Trend had been terminated by Respondent at the time of the meeting; and that if an employee is terminated during an organizing drive, the Union tells them to go to the Board. On cross-examination Zdanowicz testified that authorization cards were handed out at this meeting. Sweany testified that he attended the meeting and Trend and Cook were there but Burnside was not there; and that he signed a union authorization card at this meeting. Trend testified that he attended this meeting along with Cook and Sweany, among others; that the Union's business agents told him to go to the Board and file a charge regarding his termination; and that about 28 employees attended the first union meeting. On cross-examination Trend testified that this was the first time authorization cards were passed out. Cook testified that he attended the union meeting.

According to the testimony of Sweany, Burnside asked him if he attended the union meeting and how he felt about the Union. Sweany testified that he told Burnside that he did attend the union meeting and he was not sure what was going on with the Union but what he heard sounded positive; that Burnside said that he knew that Trend and Cook were the guys behind starting the union activities; and that Burnside raised the question of the Union. On cross-examination Sweany testified that Burnside is a supervisor. Burnside testified that he was fairly friendly with Sweany and he saw him on social occasions; that he could have told Sweany that he knew Trend and Cook were responsible for starting a union[15] but he did not remember; and that he did not know about Cook's union activities before he was terminated.

Sometime after his discussion with Burnside about the union meeting, Sweany asked Burnside while they were on the dock if the overtime he was getting would continue. Sweany testified that Burnside said that he could not guarantee that but he would do what he could; that Burnside said that after his probationary period Sweany would receive a $2-an-hour raise and he would be placed in a lead man position; and that he told Burnside that he would be interested in that.

On February 26, 1997, the Union filed a petition for an election with respect to certain of Respondent's employees in 8–RC–15516.

According to the testimony of Schill, during the period after the petition was filed and the election was held (April 17, 1997), Respondent held approximately four meetings and employees were required to attend these meetings. Schill testified that at these meetings Respondent advised employees that it did not believe that a union would be good for the employees. Sweany testified that employees were required to attend these meetings and the owner of the Company, Ed Pavlich, stated that the Company did not need a union and he did not want a union to run his company; and that Schill made presentations at two other meetings before antiunion videos were shown with respect to how the Union was going to take the employees' money and they would get nothing for their money.

During the first week of March 1997 Sweany had a conversation with Burnside in the drumming warehouse. Sweany testified that Burnside asked him if he was still attending union meetings, and how he felt about the Union; that he told Burnside that the Union would benefit him with an increase in wage and benefits but he was not too sure of the long-term benefits because he planned on getting back into management; and that Burnside raised the question of the Union. When asked if he ever asked Sweany how he felt about the Union, Burnside testified that he talked to Sweany after Trend was terminated, after he knew about the Union, "[s]o I'm going to say, I probably did." The following appears in a memorandum of Burnside, Respondent's Exhibit 7:

> THERE WAS ONLY ONE CONVERSATION BETWEEN BOB [SWEANY] AND I REGARDING THE UNION. HE STATED TO ME THAT THE UNION WAS ONLY GOING TO BENEFIT HIM SHORT TERM. HIS REASON WAS THAT HE WOULD BE MANAGEMENT WITH [SIC] ONE YEAR

Burnside testified that he and Sweany were talking and Sweany did not really have an opinion of the Union one way or the other; and that Sweany said that within a year he was going to be in a management position so it was not going to benefit him.

According to the testimony of Sweany, sometime later in March 1997 he was in Burnside's office, which is next to McNutt's office, and he overheard McNutt telling Burnside that he, McNutt, did not understand why the drivers who worked under him wanted to have a Union in the facility because he thought that he treated the drivers relatively well and if the Union went through, he can control their personal lives and can make their life a living hell. On cross-examination Sweany testified that he was in Burnside's office to get some labels for drums; that he was standing; that he did not participate in the conversation; that McNutt was in his office with the door between his office and Burnside's office open; that Burnside was "standing leaning against his desk looking at him [McNutt], as the conversation was

[14] McNutt cited driver Drew Kizmatia as a driver who he terminated for poor performance.

[15] Burnside testified that Trend told him this was when he was terminated; and that he did not recall when he first became aware of Cook becoming engaged in union activities "I don't know who, I don't know if it was just conversation, through the plant[,] [b]ecause a lot of the guys talked to me about it."

taking place"; that he finished what he was doing and he left the office; and that he told one of Respondent's drivers, Keith Bailey, what McNutt said. McNutt testified that he never threatened any employee at Chemical Solvents because of union activity. Additionally, McNutt testified that he never interrogated any employees at Chemical Solvents regarding union activities. When asked if he ever made the following statement to anyone:

> [t]hat you didn't know why the drivers wanted a union, that—that you treated drivers better than a union could, and if the Union went through, you would make their life a living hell

McNutt testified that he never made that complete statement in that context; that he might have said that he treated his drivers well and he did not understand why they were organizing; and that he never said that if the Union organized he would make the drivers life a living hell.

Vales testified that sometime in March 1997 Sweany told him that if he, Sweany, was not in management within a year, he would be out of this Company; that sometime before April 1, 1997, when he took over the inventory control position, he worked on a Saturday with, as here pertinent, Sweany and Burnside and he overheard Burnside tell Sweany both at work and later that night at Cudnick's bar that the lead man position was his for the taking; and that he did not hear wages discussed.

Respondent's employee handbook was received as General Counsel's Exhibit 5. When called by the General Counsel, Schill testified that he believed that this was the book that was in effect when Trend, Cook, and Sweany were fired but the handbook is not dated. When later called by Respondent, Schill, testified that the employee handbook received as General Counsel's Exhibit 5 became effective in April 1997, and the handbook which was in effect prior to that is General Counsel's Exhibit 7.

On April 17, 1997, the Union won the stipulated election in Case 8–RC–15516 with respect to Respondent's employees.[16] General Counsel's Exhibit 3. Zdanowicz testified that the Union challenged the ballot of Burnside on the grounds that he was a supervisor.[17] Sweany testified that he voted in the election. Trend and Cook testified that when they went to vote Schill denied them permission to come onto Respondent's property; that subsequently arrangements were made for them to come on the property and vote; and that their votes were challenged. On April 21 or 22, 1997, according to the testimony of Sweany, he had a conversation with Burnside in the drumming warehouse. Sweany testified that Burnside said that he voted no for the Union; that he was aware that Burnside's vote was challenged because he was a supervisor; that he told Burnside that he could not believe that 10 people voted no and that he voted yes in the election; and that Burnside had commented that he thought that Sweany was doing a good job or doing well. Burnside testified that he never had a conversation with Sweany regarding how Sweany voted in the representation election; that he never told Sweany how he voted; and that he never told anyone in management about his conversations with Sweany regarding the Union.

On Thursday April 24, 1997, Sweany went to a local tavern, Cudnicks, to cash his paycheck after work. Sweany testified that Burnside and some of Respondent's employees were at the tavern; that after he had been drinking for two or three hours at the tavern Burnside said that Respondent was going to give him a $1 raise and make him lead man; that he told Burnside that he was not happy with that because earlier on the shipping dock Burnside indicated that he would be getting a $2 raise along with the lead man position; that he asked Burnside to reconsider him just being a materials handler and what his raise would be, and Burnside agreed to do this; and that he thought the $1 increase was insufficient because some of the employees working under him would be getting paid the same rate; and that at some point in time he had indicated to Burnside that he wanted to get into management within a year. On cross-examination Sweany testified that Burnside brought up the raise when he and Burnside were sitting alone; and that the position discussed was the lead man position.

On April 24, 1997, according to the testimony of Burnside, he had a conversation in the shipping trailer with Sweany. Burnside testified that Vales walked in toward the end of the conversation and he does not discuss pay with an employee in the presence of another employee; that before Vales walked in he told Sweany that he was going to recommend to Schill that Sweany receive full benefits, be made lead man (with a 60–day probationary period) and receive a $1-an-hour raise; that Sweany said that he should get at least a $2-an-hour raise so that he would be making more money than employee Tom Terry who he would oversee; that Terry had worked for Respondent for 18 years; that Sweany said that if he was not in a management position within a year he was going to have to reevaluate his position and possibly move on; that he told Schill about his conversation with Sweany and Schill said, "your the one making the recommendation here"; that he told Schill that he did not think that it would work out; and that he did have a few beers at a bar with Sweany but he did not discuss wages with him at that time. On cross-examination Burnside testified that he did not remember having a conversation about increasing his wages with Sweany before April 24, 1997; that he did not remember going to Cudnick's bar that night; that he has been to that bar on Thursdays after work; that he could have gone to that bar on the evening of April 24, 1997; and that he cannot positively deny the he was there that evening. Vales testified that before he walked into Burnside's office just before he was terminated Sweany said that if he did not get what he expected he would quit; and that later he walked into Burnside's trailer and saw Burnside and Sweany talking but they stopped their conversation when he went into the office.

On April 28, 1997, the Union was certified, General Counsel's Exhibit 4, as exclusive representative of the employees in the following appropriate unit:

> All full–time and regular part–time production and maintenance employees and truck drivers, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

On April 28, 1997, Sweany was terminated. Schill testified, when called by the General Counsel, that Sweany was terminated because toward the end of Respondent's 90-day probationary period he reevaluated Sweany and determined that "we were going in different directions"; that Sweany's expectations of where he wanted to be with the Company and what we were able to offer him were two different things; that he had McNutt and Burnside together jointly offer an assistant lead man with an hourly increase to Sweany; that he was advised that Sweany wanted more money and he wanted to be part of management; that Burnside and

[16] Of the 54 eligible voters, 34 voted for the Petitioner (Union), 10 voted against the Union, and there were 9 challenged ballots.

[17] At the time of the hearing, according to the testimony of Zdanowicz, Burnside was a member of the Union, he attended union meetiings, he was allowed to vote on accepting or rejecting a contract, and he is allowed to vote on whether or not a strike should be taken in the event of impasse.

McNutt told him later in the day, after meeting with Sweany, that Sweany was highly upset with being offered only a dollar more an hour; that he was advised that Sweany said that as assistant lead man he should making more than the most senior employee he was to work with; that he then met with Sweany who was still upset about the dollar raise; that since Respondent is a small Company he did not have anything to offer Sweany and he did not want Sweany to go through the training and be an unhappy person looking for another job so he terminated Sweany; and that Sweany was a good worker and Respondent was offering him a promotion. Sweany testified that on April 28, 1997, at the end of the workday Burnside brought him into his office; that McNutt was in his office with his door open; that the conversation was between him and Burnside with McNutt in the other room; that Burnside said that his goals were too high for the Company, they were not on the same page, and his employment there was no longer needed; that he told Burnside that he thought that the Company would want someone with high goals and ambitions and Burnside said that he would give him a recommendation and assistance in finding a job with another company; that McNutt did not make any remarks during this conversation; that he was never absent and he was never warned about his work performance; and that he had been complimented for his work performance. On cross-examination Sweany testified that he was not an active organizer at the plant in that his activity consisted of going to Union meetings and talking among the hourly employees; that he had a conversation with Schill about wages after he was terminated; that Schill said that Burnside did not recall telling Sweany that he would receive a $2-an-hour raise; and that he had high goals and Schill "didn't see us on the same page." On redirect Sweany testified that he signed a union authorization card at the first union meeting. Burnside testified that Respondent's Exhibits 8 and 9 are the reasons he placed in a memorandum (typed and handwritten, respectively) for Sweany's termination; that but for Sweany not accepting wages he would have hired him as a lead man; and that he neither threatened Sweany because he belonged to a union nor did he terminate Sweany because he voted in a union election. When called by Respondent, Schill testified that Respondent terminated five named employees at the end of their probationary period; that Sweany was terminated because he was unhappy with the amount of money that Respondent offered to him; that before this the highest that Respondent offered to an employee at the end of his probationary period was about 50 cents more an hour; that Respondent made the offer to Sweany because he was capable; that he was not aware that Sweany was involved in any type of union activity; that he was not aware of any comments that anyone may have made to Sweany about his union activities; and that he did not terminate Sweany because of his union activities.

Regarding whether Burnside is a supervisor or agent within the meaning of the Act, Schill testified, when called by counsel for the General Counsel, that Burnside is a lead person in production; that Burnside is responsible for making sure that the Company's orders for incoming materials are filled "[a]nd to give direction to other employees"; that four people work under Burnside; that he is the supervisor of the people who work under Burnside; that Burnside reports directly to him; that the people who work under Burnside report to him through Burnside; that this was the situation with Burnside in December 1996 and January 1997; that Burnside has held this position for approximately 3 years; and that Burnside "directs" the people on the first shift. Sweany testified that Burnside was his direct supervisor; that he interviewed for his job with only Burnside and Burnside hired him; that Burnside explained that there was a 90-day probationary period and medical benefits would start at the end of the probationary period; and that Burnside terminated him. On cross-examination Sweany testified that Burnside told him that he was going to a union meeting but he was told not to go by Schill. Trend testified that Burnside hired him and Burnside was his supervisor when he worked as a materials handler and in inventory; that Burnside transferred him to inventory; that Burnside assigned him overtime and could require him to come in to work early or stay late; that Burnside, with Schill present, told him that he was terminated; and that with respect to the "EMPLOYEE WARNING REPORT's" supposedly issued to Trend, Burnside signed all but two as "Supervisor." McNutt testified that lead men do not have the authority to hire or fire but they can make recommendations on disciplinary actions; and that Burnside was Trend's immediate supervisor. Burnside testified that he is the lead person over four or five material handlers; that he performs the work of a materials handler; that he is paid hourly; that as lead person he oversees the operation, gives out job assignments and works with the employees on a daily basis; that he is a member of the Union, attends union meetings and votes in union elections; that as lead man he does not have authority to hire or fire but he does have the authority to discipline in that he can give warnings; that he cannot give time off; that he does make recommendations to Schill for discipline, hiring, and firing and Schill has the ultimate authority regarding these matters; and that when he told Schill about his April 24, 1997 conversation with Sweany, Schill said "your the one making the recommendation here." On cross-examination Burnside testified that there is a shipping office with two desks in it and he uses one and the employees use the other; that four employees report to him; that he assigns employees their work; that he assigns the employees their overtime; that he can verbally warn employees about their performance; that he recommended the transfer of Trend to inventory and the recommendation was put into effect; that he evaluates his employees' work performance; that in his May 6, 1997 affidavit which was turned over to the Board, General Counsel's Exhibit 29, he indicated "I am the Shipping and Receiving Supervisor for Chemical Solvents, Inc. . . . since 1991 . . ."[18] and "[d]uring the entire time that Mr. Trend was employed at Chemical Solvents, I was his immediate supervisor";[19] that he recommended the termination of Paul Barrons and he was terminated; and that in his June 13, 1997 affidavit he indicates as follows:

> As the results of Mr. Sweany's unrealistic expectations, I decided to release him from his employment at the conclusion of the 90 day probationary period.

Burnside also testified that he recommended the decision to terminate Sweany; that the June 13, 1997 affidavit, indicates that he made the decision; that "it was my decision that he got terminated"; and that he made the decision. On redirect Burnside testified that he was not able to carry out the decision to terminate Sweany himself because he does not have authority to hire, fire, or give raises; and that Schill made the final decision to terminate Sweany. When called by Respondent, Schill testified that the lead men work side-by-side with the men in the plant; and that they often perform the same duties as the men in the plant. On cross-examination Schill testified that, as indicated above, Burnside interviewed Trend and he did not recall personally interviewing

[18] He made a similar statement in his June 13, 1997 affidavit, which was turned over to the Board, GC Exh. 30.

[19] He made a similar statement regarding Sweany in his June 13, 1997 affidavit.

Trend; that Burnside came to him and recommended to him that Trend be hired and he hired Trend based on Burnside's recommendation; that he personally did not interview Sweany; that Burnside interviewed Sweany; that Burnside recommended hiring Sweany; that he agreed with the recommendation and hired Sweany; that Burnside investigated the incidents regarding Trend where Burnside drafted the above-described warnings and he approved Burnside's requests to place the warnings in Trend's file; that Burnside has access to personnel files through him; and that, before they were sent, he reviewed Respondent's two position statements submitted to the Board, General Counsel's Exhibits 31 and 32, which statements contain the following statements, respectively, "supervisor . . . Burnside" and "Burnside, Chemical Solvent's Shipping and Receiving Supervisor and . . . [Sweany's] immediate supervisor."

Analysis

In my opinion, Burnside is a supervisor within the meaning of the Act. Respondent, in its response to the complaint, admitted that he was a supervisor and agent within the meaning of the Act. At the hearing, Respondent took the position that he was not a supervisor. On brief, counsel for the General Counsel contends that Burnside exercised a number of functions that confer supervisory authority on an individual; that he could compel employees to work overtime, he effectively recommended (a) issuing written discipline to employees, (b) transferring Trend, and (c) hiring and firing employees, and he evaluated employees; that the exercise of any one of these functions is enough to convey supervisory authority and he exercised several; that the fact that Burnside, after the Union was certified, became a union member must be viewed in the light of the fact that the Union challenged his ballot on the basis of him being a supervisor; that whatever his current status, at the times material to the instant case, Burnside was exercising supervisory authority; that Respondent admitted such in its above-described affidavits and position statements; and that at a minimum, Burnside was an agent of Respondent under Section 2(13) of the Act because "under all the circumstances, the employees could reasonably believe" that Burnside was "reflecting company policy, and speaking and acting for management," *American Lumber Sales*, 229 NLRB 414, 420 (1977). Respondent, on brief, argues that the fact that Burnside is a member of the bargaining unit means that he is an employee and not a supervisor or an agent under the Act.

Section 2(11) of the Act defines "supervisor" as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Only Burnside interviewed Trend and Sweany and both were hired. Only Burnside signed certain of Trend's written warnings as supervisor and no one else signed them. Burnside effectively recommended the termination of the individuals named above. The burden of proving that an employee is a supervisor within the meaning of the Act rests on the party alleging that such status exists. Here Respondent, in its reply to the complaint, admitted Burnside's supervisory status. It was explained to Respondent at the outset of the hearing that since it was changing its position regarding this matter at the last minute, it would have the burden of proof. Respondent treated Burnside as a supervisor in the above-described affidavits and position statements. And at page 41 of its brief it continues to refer to Burnside as a supervisor. Additionally, Respondent admitted in its response to the complaint that Burnside was an agent of Respondent within the meaning of Section 2(13) of the Act, and it did not attempt to specifically modify this response. As alleged in the complaint, Burnside is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within Section 2(13) of the Act.

Paragraph 6(A) of the complaint alleges that on or about February 11, 1997, Respondent, by its supervisor, Burnside, at Respondent's facility, unlawfully threatened employees by implying that an employee would be fired because of the union activities engaged in by the employees. Counsel for the General Counsel, on brief, contends that Burnside gave no testimony regarding this specific conversation, other than a general denial that he threatened employees; that what is at issue is what Burnside told the employees, not what McNutt actually said, and the sole unrefuted evidence on this specific incident is Cook's testimony; that Cook was indeed fired 2 days after this threat was made; and that by making the above-described comments to employees Cook and Bailey, Burnside was impliedly threatening employees with discharge for engaging in union activities which is a violation of Section 8(a)(1) of the Act, *Santa Rosa Blueprint Service*, 288 NLRB 762 (1988). Respondent, on brief, argues that even if Burnside made the alleged threat, no reasonable person would conclude from the totality of the circumstances that it would be carried out; and that the alleged threat would have been moot because on August 22, 1996, well prior to the alleged threat, McNutt had already made the determination to terminate Cook for misconduct. As pointed out by counsel for the General Counsel, Burnside did not even specifically deny making the statement that McNutt takes this union business very personal, he takes care of his drivers and this week he's going back through all the files and he is going to fire one of the drivers. Burnside's general denial that he never threatened any employee regarding union activities carries no weight when one considers the fact that it could be argued that Burnside may have believed that he was not making a threat by repeating what someone else said. What matters here is not what McNutt said but what Burnside said. The threat was carried out just days later. For the reasons given below, Respondent's justification for the actions it took against Cook on February 14, 1997, are pretextual. But even if they were not, Burnside was not free to make the statement he did tying a termination by McNutt to the fact that he took the union business very personal. As alleged in paragraph 6(A) of the complaint Respondent violated Section 8(a)(1) of the Act.

Paragraph 6(B) of the complaint alleges that sometime during January 1997, Respondent, by its supervisor, Burnside, at Respondent's facility, unlawfully interrogated an employee regarding the union sympathies of other employees. On brief, counsel for the General Counsel contends that questioning an employee about why employees want a union violates Section 8(a)(1) of the Act even in the absence of threats, but here Burnside's questioning was accompanied by a threat. Respondent, on brief, argues that the Board specifically held in *Rossmore House*, 269 NLRB 1176 (1984), that no violation occurred when the employer asked the employee why he wanted a union and therefore, without more, Burnside's alleged question did not violate the Act. As noted above, Trend testified that Burnside asked him why the employees

wanted a union. Trend also testified that he did not wear any union insignia and he did not identify himself as a union organizer, except to fellow employees. Burnside testified that he was not aware of Trend's union activities prior to the day he was terminated. *Rossmore House*, supra, spoke to an employer's questioning open and active union supporters about union sentiments in the absence of threats. It has not been shown that Trend was an open union supporter. And as concluded below, here there was not an absence of threats. Burnside conceded that he probably did ask Sweany about how he felt about the Union after Trend was terminated. Burnside asked Trend why the employees wanted a union before Trend was terminated. Trend's testimony is credited on this point. This was not the first time Burnside asked him why the employees wanted a union. Burnside's testimony that he was not aware of Trend's union activities prior to the day he was terminated must be viewed in the light of Burnside's testimony that he did not recall when he first became aware of Cook becoming engaged in union activities "I don't know who, I don't know if it was just conversation, through the plant[,] [b]ecause a lot of the guys talked to me about it." Cook was a driver. He was not supervised by Burnside. As Schill testified, Respondent is a small company. Burnside knew of Trend's union activity when this conversation occurred not because Trend was open about it but rather because Burnside heard about it. By Burnside interrogating Trend, Respondent violated the Act as alleged in paragraph 6(B) of the complaint.

Paragraph 6(C) of the complaint alleges that sometime during the week of February 17, 1997, Respondent, by its supervisor, Burnside, at Respondent's facility, unlawfully interrogated an employee regarding his union sympathies and created the impression that employees' union activities were under surveillance. On brief, counsel for the General Counsel contends that Burnside did not deny telling Sweany, after asking him if he attended the union meeting and how he felt about the Union, that he, Burnside, said that he knew that Trend and Cook were the guys behind starting the union activities; that Burnside testified that he could have said that but he could not remember; that at one point Burnside testified that he probably did ask Sweany how he felt about the Union; that Burnside's questions implied that he knew of the meeting and his comment indicated that he knew which employees were responsible for starting the union activities; and that this comment created the impression that employees' union activities were under surveillance. Respondent, on brief, argues that "a mere discussion between a *supervisor* and an employee who work closely on a daily basis regarding 'ongoing unionization efforts' is not only lawful under the . . . [Act], it is expected." Respondent's brief page 41. (Emphasis added.) Citing *Rossmore House*, supra, Respondent argues that such conversation, even if it did occur, simply does not, where Sweany and Burnside share beers after work, rise to the level of a threat or coercion. Sweany was not open about his support for the Union and this conversation, which occurred within days of Trend and Cook being terminated, did not occur over a beer in a bar. It occurred in an atmosphere permeated with numerous violations of the Act. Sweany's testimony is credited. Burnside did not deny the alleged conduct. Rather, he conceded that he could have or probably did engage in it. Respondent violated the Act as alleged in paragraph 6(C) of the complaint.

Paragraph 6(D) of the complaint alleges that sometime during the first week of March 1997, Respondent, by its supervisor, Burnside, at Respondent's facility, unlawfully interrogated an employee regarding his support for the Union. Counsel for the General Counsel, on brief, contends that this questioning violated Section 8(a)(1) of the Act. As noted above, Sweany testified that Burnside asked him if he was still attending union meetings, and how he felt about the Union. Burnside testified that he probably did ask Sweany how he felt about the Union. Burnside also asked Sweany if he was still attending union meetings. In the past, as found above, Burnside asked Sweany if he attended the first union meeting. Sweany's testimony is credited. Burnside asked him if he was still attending union meetings. Sweany was not an open, active union supporter. Burnside's interrogation was unlawful. Respondent violated the Act as alleged in paragraph 6(D) of the Act.

Paragraph 6(E) of the complaint alleges that sometime during December 1997, Respondent, by its supervisor, Burnside, at Respondent's facility, unlawfully threatened employees with discharge if employees engaged in union activities. It appears that the allegation was meant to refer to December 1996. Counsel for the General Counsel, on brief, contends that Burnside's threatening Trend that employees would be discharge for engaging in union activity violates Section 8(a)(1) of the Act. As noted above, Trend testified that in December 1996 Burnside told him that the people leading the union drive would be terminated. Burnside did not specifically deny making this threat. Rather, Burnside testified in general that he never threatened any employee regarding union activities. Trend's testimony is credited. Obviously this is a coercive statement in violation of the Act. Respondent violated the Act as alleged in paragraph 6(E) of the complaint, as modified to reflect the correct year, viz, 1996.

Paragraph 6(F) of the complaint alleges that sometime during January 1997, Respondent, by its supervisor, Burnside, at Respondent's facility, unlawfully threatened employees with discharge if employees engaged in union activities. This allegation refers to the same conversation covered above with respect to paragraph 6(B) of the complaint. Trend testified that Burnside said that the employees who organized a union would be terminated. Burnside did not specifically deny making this threat. Rather, Burnside testified in general that he never threatened any employee regarding union activities. Trend's testimony is credited. Burnside repeated the threat and consequently Respondent violated the Act again. Respondent violated the Act as alleged in paragraph 6(F) of the complaint.

Paragraph 6(G) of the complaint alleges that sometime during late March 1997 Respondent, by its supervisor, McNutt, at Respondent's facility, unlawfully threatened employees with unspecified reprisals if they supported the Union. Counsel for the General Counsel, on brief, contends that McNutt's comment that if the Union went through, he could make employees' lives a living hell constitutes a threat of unspecified reprisals in violation of the Act, *Southwire Co*., 282 NLRB 916 (1987). Burnside did not specifically deny that this statement was made. McNutt apparently denied it in his own way. However, in my opinion McNutt is not a credible witness in view of his role in Cook's termination, as treated below. Sweany's testimony on this issue is credited. The statement was made. There has to be coercion for there to be a violation here. In other words, management has to be aware that an employee or employees overheard the unlawful statement. If I interpret Sweany's testimony correctly,[20] he over-

[20] I am concluding that the following testimony, namely, "Burnside was standing leaning against his desk looking at him, as the conversation was taking place" means that Burnside was leaning against his own desk. That being the case, at least Burnside was aware of the presence of Sweany during this conversation.

heard a conversation between two supervisors when one of the supervisors was in another room but his supervisor, a participant in the conversation, was in his, Sweany's, presence. In my opinion that is sufficient. Neither supervisor sought to withdraw the statement at the time or at any time thereafter. Respondent violated the Act as alleged in paragraph 6(G) of the complaint.

Paragraph 7(A) of the complaint alleges that on January 16 and 17, 1997, Respondent placed written warnings in the personnel file of Trend because he joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Counsel for General Counsel, on brief, contends that in view of the fact that Trend never saw the "1–16–97" warning at that time, was not given the opportunity to review it, did not sign it, and Burnside's signature is dated "2/16/97," Respondent could easily have placed, notwithstanding his protestations to the contrary, this warning in Trend's file after his termination (February 13, 1997) for pretextual reasons; that again Trend never saw the "Jan 17, 1997" warning at that time, did not sign it, and was not given the opportunity to refute the facts as alleged at the time; that Respondent did not produce any lab records at the hearing to verify whether or not Trend turned in the sample and such records are exclusively under Respondent's control; that due to the disparities of the facts as alleged by Respondent, and the facts as testified to by Trend, the validity of all these warnings must be called into question; that the January 16 and 17, 1997 warnings, occurred well after Trend commenced union activity and after Respondent twice unlawfully interrogated and threatened Trend; and that while paragraph 7(A) of the complaint refers to Respondent placing written warnings in Trend's file, the Respondent's response dated August 18, 1997, reads as follows:

> In response to Paragraph 7(A) of the Complaint, Respondent admits that on January 16, 1997, Richard Trend was *reprimanded* because he failed to place various inventory items in their designated location and that on January 17, 1997, he was again reprimanded for failing to follow his supervisor's instructions regarding the sampling of a product prior to shipment, but is without knowledge or information to form a belief as to the remaining allegations contained in Paragraph 7(A) of the Complaint. [Emphasis added.]

Counsel for the General Counsel contends that

> [t]he fact that at the time of its Answer, Respondent could not figure out whether the warnings were 'written' or "placed in the personnel file" of Trend argues that these warnings were spurious, pretextual, and possibly actually placed in Trend's file after he was terminated, despite Burnside's denial of this.

It is contended by counsel for the General Counsel that accordingly Trend's January 16 and 17, 1997 written warnings violate Section 8(a)(1) of the Act. The problem with the last argument of counsel for the General Counsel is that counsel for the General Counsel introduced Burnside's affidavit and Respondent's position statement, General Counsel's Exhibits 29 and 31, respectively, regarding the Trend proceeding, both of which are dated May 6, 1997, and both of which refer to the written warnings. (The affidavit refers generally to five written warning reports and the position statement refers specifically to the January 16 and 17, 1997 Trend warning reports.) Respondent, on brief, argues that other than raising the question why Trend did not sign these memorializations, the General Counsel put forth no evidence to impeach Burnside or the validity of Burnside's memorializations.

In my opinion Respondent violated the Act as alleged in paragraph 7(A) of the complaint. The analysis for paragraphs 7(A) and (B) will be done pursuant to *Wright Line*, 252 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). The General Counsel has the initial burden, as here pertinent, of establishing that union activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus.[21] Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove that the alleged conduct in question would have taken place even in the absence of protected activity. The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). As concluded above, after commencing his union activity and before the January 16 and 17, 1997 warning reports, Respondent unlawfully interrogated and threatened Trend twice. In this, according to Schill, small company word travels, as indicated by Burnside.[22] Burnside's conduct toward Trend before January 16, 1997, demonstrates that Respondent knew of Trend's union activity and it was willing to engage in unlawful conduct toward him in an effort to get him to stop. Employer animus is demonstrated by Respondent's many unlawful acts. Additionally, as noted above, Sweany testified that, after the Union filed a petition for an election, employees were required to attend meetings and the owner of the Company, Pavlich, stated that the Company did not need a union and he did not want a union to run his company; and that Schill made presentations at two other meetings before antiunion videos were shown with respect to how the Union was going to take the employees' money and they would get nothing for their money. The General Counsel has established that union activity was a motivating factor in Respondent's action. Consequently, the burden of persuasion shifts to the Respondent to prove that the alleged discriminatory conduct would have taken place in the absence of protected activity. A great deal of Burnside's testimony is not credible. And to further compound the situation, albeit Respondent's own warning report provides in more than one place for the participation of the employee, Trend, by the admission of

[21] As pointed out by the Board in *Flor Daniel, Inc*., 311 NLRB 498 (1993):

> It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be based on the Board's review of the record as a whole. [Footnotes omitted.]

[22] The violations of the Act committed by Respondent against Trend, along with Cook and Sweany, lead inescapably to the conclusion that Respondent knew of their union activity. Also the inference is warranted that Respondent learned of their union activity by application of the small plant doctrine.

Regarding Burnside's testimony, as pointed out (by) Chief Judge Hand in *NLRB v. Universal Camera Corp*., 170 F.2d 749, 754 (2d Cir. 1950):

> It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions then to believe some but not all.

Respondent's own witnesses, did not see the warning reports until sometime after he was terminated. Trend's explanation of the January 16, 1997 incident, is not refuted by any credible evidence. I credit Trend's testimony on this point. The only witness taking a contrary position is Burnside. Burnside originally testified that the fact that he dated his signature 1 month after the alleged incident is "[p]robably just a mistake. . . ." This testimony is incredible. Either it was a mistake or he dated his signature 1 month after the incident and 3 days after Trend was terminated. Burnside did not offer to clear up this matter. But on recross when counsel for the General Counsel asked him if he placed this document in Trend's file after he was terminated, Burnside answered "[n]o this was when it happened." The January 17, 1997 warning report with Trend's name on it is even more interesting. Again one is asked to rely solely on Burnside's testimony and the document itself. Again, Trend is denied the opportunity to participate although Respondent's company form specifically provides in more than one place for the employee's participation. While the warning is dated January 17, 1997, it refers to an incident which allegedly occurred on January 16, 1997. In other words, there were allegedly two incidents on the same day. I credit Trend's testimony with respect to what occurred with the PPG tote sample that day. Burnside concedes that he did not check the log book or the analysis sheet to see if the sample was logged in. While this charge originated with McNutt, he did not testify about it. Burnside allegedly was relying on what he was told by McNutt and what Burnside alleges that Trend said. I do not credit Burnside's testimony. As pointed out by counsel for the General Counsel, Respondent did not produce any lab records at the hearing to verify whether or not Trend turned in the sample and such records are exclusively under Respondent's control. Respondent did not meet its burden of persuasion with respect to either the January 16 or 17, 1997 documents in question. In this regard, Respondent violated the Act as alleged in paragraph 7 of the complaint.

Paragraph 7(B) of the complaint alleges that on February 12, 1997, Respondent terminated Trend, on February 14, 1997, Respondent terminated Cook and on April 28, 1997, Respondent terminated Sweany because they joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Counsel for the General Counsel, on brief, contends that Burnside asserts that he made a decision to terminate Trend in mid-December 1996, which was after his union activity began; that the timing of an employer's action can be persuasive; that the evidence shows that Trend's termination followed after a string of questionable and at least two pretextual warnings; that Burnside admitted that he personally never saw Trend smoke in an unauthorized area, and he could not verify that others had;[23] and that Respondent's claim that it discharged other material handlers for work performance problems similar to Trend's is not supported by its own evidence. Respondent, on brief, argues that even if Respondent had knowledge of Trend's allege protected activity, the evidence establishes that Trend would have been terminated wholly apart from the alleged protected conduct; that on one occasion Trend was caught smoking a cigarette in an unauthorized area next to large containers of highly flammable and volatile chemicals; that Trend's minimal involvement in the union organizing efforts cannot act as a crutch allowing him to disobey the legitimate, safety oriented rules of his employer; and that Trend's credibility must be viewed in the light of Vales' testimony regarding what he told Trend in mid–December 1996.

In my opinion Respondent unlawfully terminated Trend and Cook. Under *Wright Line*, supra, Trend engaged in union activity and Respondent knew. With respect to the timing of the termination, Respondent started thinking about terminating Trend in mid-December 1996 when he began the organizing drive. At that time it asked Vales if he would be willing to take over Trend's job.[24] Contrary to Respondent's assertion on brief, Trend's involvement in the union organizing efforts was not minimal. Trend was the main proponent. He contacted the Union. He spoke to the other employees. He had Cook talk to the drivers about the Union. He made the arrangements for union meetings and he told employees about the first union meeting to be held on February 15, 1997. Trend was a good employee. He had a good attendance record. In the past Respondent accommodated him with the above-described transfer. Respondent attempted to get Trend to back off, indirectly indicating that it knew of his union activity and what would happen to the leaders of the organizing drive. In February 1997 Respondent realized that its efforts failed. On February 5, 1997, Trend asked Sweany to attend the first union meeting on February 15, 1997. Undoubtedly Trend, about this same time, asked other employees to attend this first union meeting. On realizing that its efforts had failed, Respondent terminated Trend just 2 days before the first union meeting which he had been so instrumental in bringing about. Counsel for the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's action. Respondent has not demonstrated that the same action would have taken place notwithstanding the protected conduct. As pointed out by counsel for the General Counsel, the termination followed a string of questionable and at least two pretextual warnings. Respondent now argues that with his smoking, Trend disobeyed its legitimate, safety oriented rules. This was not the reason Respondent gave Trend for his termination. Respondent did not take any disciplinary action against Trend when this infraction allegedly occurred. Respondent violated the Act in unlawfully terminating Trend as alleged in paragraph 7 of the complaint.

With respect to the termination of Cook, counsel for the General Counsel, on brief, contends that while McNutt claimed he considered Cook a liar and a safety hazard, he let Cook continue to drive for about 6 months even though Cook spent the majority of his day away from Respondent's facility and had to resecure his load after each delivery; that Cook performed his job satisfactorily after the August 14, 1996 incident so Respondent was in no hurry to get rid of him until he became active in the Union in early January 1997; that Respondent knew of Cook's union activity impliedly using the small plant doctrine, and directly, as evidenced by Burnside's comments to Cook directly in February 1997 and to Sweany in February 1997; that Respondent simultaneously discharged Trend, the other main union organizer, is further evidence that both discharges were unlawfully motivated; and that Respondent's reasons for discharging Cook have shifted in that when he was discharged he was told it was for unsafe loads, and at the hearing it was indicated that the alleged inconsistencies in Cook's story tipped the balance. Respondent, on brief, argues that there is no evidence that Cook performed any organizational

[23] Burnside did not testify that he was aware of Vales' observation regarding Trend smoking. Consequently this could not have been a consideration.

[24] Vales' statements to Trend in mid-December 1996 were based on what Burnside told Vales after Burnside learned of Trend's union activity.

activities on the Union's behalf; that the event leading to Cook's eventual termination could have had serious consequences for Respondent because of the nature of its business is to deal in highly explosive and dangerous chemicals; that even if Burnside made the alleged February 12, 1997 threat, no reasonable person would conclude from the totality of the circumstances that it would be carried out; that McNutt personally witnessed Cook's failure to adequately conduct a pretrip inspection and at that point, given the culmination of Cook's apparent untruthfulness and continued flagrant unwillingness to perform the requirements of his job, McNutt determined to terminate Cook; and that Respondent "simply could not tolerate or accept such deviation from its policies and government-mandated policies and . . . Cook made it clear from numerous instances that he would not faithfully adhere to these standards."

Counsel for the General Counsel has shown that Cook engaged in union activity, namely, organizing the drivers, and Respondent knew. Burnside's threat to Cook on February 12, 1997, demonstrates this. Cook was terminated 1 day before the first union meeting, 1 day after the other main organizer, Trend, was terminated, and 2 days after Burnside threatened that McNutt takes this union business very personal, he takes care of his drivers and this week he's going back through all the files and he is going to fire one of the drivers. The General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's action. The burden of persuasion shifts to the Respondent to prove that the alleged discriminatory conduct would have taken place even in the absence of protected activity. McNutt testified that he had reason to be concerned about Cook's approach to safety considerations because of the August 14, 1996, dented drums incident and this concern was heightened when he allegedly witnessed Cook fail to properly conduct a pretrip inspection. Yet McNutt would have one believe that he let Cook go out on the road where he is unsupervised for another 6 months before terminating him. And coincidentally this is after he became involved in union activity. McNutt wrote "Contemplating termination of employment" on the August 22, 1997 warning report, General Counsel's Exhibit 22. The contemplation lasted for about 6 months. And it resulted in action only after Respondent was unsuccessful in terminating the union organizing attempt and there was going to be a union meeting of its employees. At one point McNutt testified that Cook "lied to me again [after the August 14, 1996, dented drums incident] just a few days later when I caught him not securing his load properly." The warning report and other of McNutt's testimony refer to a failure to properly conduct a pretrip inspection "to inspect the load for proper secureness or count the materials." General Counsel's Exhibit 22. According to the warning report and other of his testimony, McNutt did not catch Cook not securing his load properly. Allegedly McNutt caught Cook not properly conducting his preinspection. McNutt testified that he discussed this matter with Cook and on the basis of his discussion he was satisfied that Cook appreciated the need to meet the involved safety considerations and it would be alright for him to be out on the road by himself. Cook testified that this conversation never occurred. I credit his testimony. McNutt was not a credible witness. He never discussed the August 22, 1996 alleged failure to inspect or the warning report regarding this alleged incident with Cook because it did not occur. In my opinion this warning report was fabricated sometime after Respondent found out that Cook was involved in the union campaign. Respondent's Exhibits 4 and 5 show that Respondent advertised for "drivers" and it processed one driver applicant on December 12, 1996. However, Cook was not told that he was being replaced and, notwithstanding the notes on these two exhibits, it has not been demonstrated that Respondent was contemplating the hiring of drivers to replace Cook at that time. Respondent has not shown that Cook's termination would have taken place in the absence of protected activity. In terminating Cook, Respondent violated the Act as alleged in paragraph 7 of the complaint.

Regarding the termination of Sweany, counsel for the General Counsel, on brief, contends that Respondent committed 8(a)(1) violations against Sweany on two occasions; that Sweany acknowledged to Burnside that he voted for the Union and that he could not believe that 10 people voted "no"; that he was discharged about 1 week later; and that Sweany's status as a probationary employee does not provide some special excuse for Respondent to discharge him. Respondent, on brief, argues that it was Sweany's refusal to accept a $1 raise, the highest ever offered to an employee coming off probation, coupled with his statement to Burnside and Vales that if he was not in management within 1 year, or did not get what he expected in the way of a wage increase, he would quit, that resulted in his termination; that it was entirely unreasonable for Respondent to expend time and money training Sweany only to have him leave within a year as Schill could foresee no management positions opening within that time even if Sweany could demonstrate adequate qualifications for promotion; that even if Sweany's testimony is credited regarding his conversations with Burnside, Respondent had a legitimate reason for terminating Sweany wholly apart from an alleged illegal motive; and that Sweany refused the amount of the raise offered to him and Respondent decided that it should not waste its time on him and terminated him.

Sweany's testimony regarding his conversations with Burnside is credited. Accordingly, Respondent knew that he attended union meetings and that he voted "yes" in the election, which latter information he volunteered after Burnside told him that he voted "no" for the Union. By his own admission, Sweany was not an active union organizer at the plant. Regarding timing, Sweany was terminated the day the Union was certified. But this was also the end of his probationary period. These facts, in addition to the employer animus, are sufficient to make a prima facie showing to support the inference that the protected conduct was a motivating factor. But, in my opinion, Respondent has demonstrated that it would not have made Sweany a permanent employee notwithstanding the protected conduct. Crediting Sweany's version of what happened, he indicated that he wanted to be in management within a year, he was finally offered a raise in the amount of $1 an hour to take a lead man position, he asked for more and when that was refused, he asked if he remained a materials handler, what would he earn. Respondent made an offer and Sweany turned Respondent down. Respondent had a legitimate business justification apart from the protected conduct for refusing to make Sweany a permanent employee. With respect to Sweany's termination, Respondent did not violate the Act as alleged in paragraph 7.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by unlawfully threatening employees, by unlawfully interrogating

employees, and by creating the impression that the employees' union activities were under surveillance.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by placing written warnings in the personnel file of Richard Trend, and by unlawfully terminating Richard Trend and John Cook.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as found, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Richard Trend and John Cook, it will be recommended that Respondent be ordered to reinstate them to their former positions and make them whole for any loss of earnings and benefits they may have suffered as a result of the Respondent's unlawful conduct, in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Chemical Solvents, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully threatening employees, unlawfully interrogating employees, and creating the impression that the employees' union activities are under surveillance.

(b) Placing written warnings in the personnel file of Richard Trend because he joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

(c) Discharging Richard Trend and John Cook because they joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Richard Trend and John Cook full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Richard Trend and John Cook whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Richard Trend and John Cook in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Cleveland, Ohio facility copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized agent, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the act not specifically found.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."